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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ABEL MONTES ARROYO, Defendant and Appellant.	H034187 (Santa Clara County Super.Ct.No. CC809888)

Defendant Abel Montes Arroyo pleaded no contest to felony false imprisonment (two counts), assault with a firearm, and making criminal threats, and he admitted special allegations concerning the personal use of a firearm. The court sentenced defendant to a prison term of four years, four months. The court imposed various fines, fees, and assessments in connection with the sentence. Although it was not reflected in the reporter's transcript of the sentencing hearing, the clerk's minutes reflect the imposition of an assessment of $120 related to maintenance of court facilities, pursuant to Government Code section 70373, subdivision (a)(1).[1]

[1] Further statutory references are to the Government Code unless otherwise noted, and section 70373, subdivision (a)(1) will be referred to as section 70373(a)(1).

On appeal, defendant asserts two challenges to the imposition of the assessment under section 70373(a)(1). First, he argues that because the court did not orally pronounce this assessment at the time of the sentencing hearing, it was error to have included it in the minutes from that hearing and in the abstract of judgment. Second, defendant contends that the imposition of the assessment constituted an ex post facto punishment because section 70373(a)(1) became effective after the date of the commission of the subject offenses. We conclude that the references to the imposition of an assessment under section 70373(a)(1) in the clerk's minutes and the abstract of judgment are improper because they are inconsistent with the oral pronouncement of sentence. We conclude however, that the section 70373(a)(1) assessment is mandatory and that its imposition here does not violate the constitutional prohibition against ex post facto laws. Therefore, we perform a rather quirky but required form of judicial prestidigitation, in which we will order the assessment stricken from the minutes and abstract, and then order that the judgment be modified to reflect this court's imposition of the same assessment. As so modified, we will affirm the judgment.

FACTUAL BACKGROUND[2]

The incident took place in the early evening of June 24, 2008, at a Santa Clara business, Clean Innovation, where defendant was employed. Defendant was arguing with a coworker, Gilbert Villalobos in the lobby, and he demanded that Villalobos turn over the "charger" (i.e., magazine for defendant's gun). Villalobos "said [, '] no[']. He said, 'My phone is different from yours." Defendant responded, " 'No, I'm talking about the gun.' " Defendant then pushed Villalobos and held a gun up to his ribs as they were walking. Defendant also grabbed

[2] The brief discussion of facts is taken from the probation report and from the testimony of one of the victims given at the preliminary examination.

another coworker, Ismael Cosio, and pushed both men toward the warehouse with a gun in his hand. (Defendant was Cosio's supervisor.) Defendant told Cosio that he wanted to kill him.

After Villalobos and Cosio were moved forcibly by defendant to the warehouse, another supervisor, Arturo, came into the warehouse. Villalobos and Cosio "were able to walk away from . . . defendant after their supervisor approached them and engaged . . . defendant in a discussion. Cosio believed . . . defendant was angry because Cosio had previously refused an order given by . . . defendant." Defendant fled the area before the police arrived.

PROCEDURAL BACKGROUND

Defendant was charged by amended information filed November 5, 2008, with four felonies: two counts of false imprisonment (Pen. Code, §§ 236/237; counts 1 and 2); assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 3); and making a criminal threat (Pen. Code, § 422; count 4). The amended information alleged further that defendant personally used a firearm in the commission of the false imprisonment and criminal threat offenses (Pen. Code, § 12022.5, subd. (a)), and personally used a dangerous and deadly weapon in connection with the commission of the assault with firearm offense (Pen. Code, §§ 667/1192.7).

After a jury was impaneled, on November 5, 2008, defendant pleaded no contest (nolo contendere) to all four counts as charged and admitted the weapon use allegations. The plea was with the understanding that he would receive a maximum prison sentence of four years, four months.[3] Before accepting the plea,

[3] The court indicated at the time defendant changed his plea that it intended to sentence defendant to a prison term of no more than four years, four months. The People indicated that they would oppose such a sentence.

defendant was advised of the rights that he would be waiving by entering a plea of no contest, and the court found that defendant knowingly and voluntarily waived those rights. There was a stipulation that there was a factual basis for the plea.

On February 6, 2009, the court imposed a low-term sentence of 16 months for the count 1 conviction, and a consecutive three-year term for the firearms enhancement, for a total prison sentence of four years, four months. The court also imposed separate, low-term, concurrent sentences for the remaining counts and the firearms enhancements associated with each of them, namely, 16 months for each offense and three years for each enhancement. The court also ordered defendant to pay a restitution fine of $3,200 (Pen. Code, § 1202.4, subd. (b)), a suspended parole revocation restitution fine of the same amount (Pen. Code, § 1202.45), a court security fee of $20 per count ($80), and a criminal justice administration fee of $129.75. In addition to those fees and fines announced by the court at the sentencing hearing, the clerk's minutes, as well as the abstract of judgment, reflect the imposition of an "ICMF" assessment of $120 that apparently relates to an assessment imposed pursuant to section 70373(a)(1).

Defendant filed a motion for relief from default for failure to timely file a notice of appeal, which we granted. A notice of appeal was thereafter filed on behalf of defendant based upon grounds arising after entry of the plea which do not challenge the plea's validity.

DISCUSSION

I. *Was Assessment as Reflected in Clerk's Minutes Lawful?*

Defendant argues that the assessment imposed under section 70373(a)(1) must be stricken because it was not part of the oral pronouncement of the court at the sentencing hearing. He contends that the clerk was without authority to include in the minutes an assessment that was not specifically imposed by the court. And he argues further that "the assessment was not mandatory in this

situation." The Attorney General responds that the imposition of the assessment under section 70373 was mandatory; therefore, "the trial court clerk correctly included the $120 assessment in the abstract of judgment and minute order of the sentencing hearing." He suggests that this court modify "the oral judgment" to reflect the imposition of the assessment, and he observes that we need not modify the abstract of judgment because it properly reflects the assessment which the trial court had a duty to impose. We conclude that each party is partly correct and partly incorrect.

It is the oral pronouncement of the court that is the judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) The clerk's entry of the judgment in the minutes thereafter is "a clerical function [citation. Therefore,] a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error. Nor is the abstract of judgment controlling." (*Ibid.*; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.) Thus, where the clerk's minutes are in conflict with the oral pronouncement of the court, the oral pronouncement controls. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.)

The entry of the minutes thus being a clerical function, we conclude that the reference therein to an "ICMF" assessment of $120—which nowhere appears in the oral pronouncement—is a discrepancy that must be treated as a clerical error. (See, e.g., *People v. Farell*, *supra*, 28 Cal.4th at p. 384, fn. 2 [oral pronouncement of probation term of three months in jail controlled over five-month incarceration term in clerk's minutes].) Where the minutes or abstract do not accurately reflect the oral pronouncement, the appellate court may order them corrected. (*People v. Zackery* (2007) 147 Cal.App.4th 380; 385-386, 388, 389; *People v. Rowland* (1988) 206 Cal.App.3d 119, 123-124.) Further, we are aware of no legal basis—and none is cited—that would authorize the appellate court under these

circumstances to amend the trial court's oral pronouncement as suggested by the Attorney General. We therefore will order that the references to "ICMF $120" in the February 6, 2009 clerk's minutes and abstract of judgment be stricken.

II. *Is Imposition of Assessment Under Section 70373 Mandatory?*

Our striking of the references in the minutes and abstract to the section 70373(a)(1) assessment, however, does not end our inquiry. As noted above, the Attorney General argues that (1) the clerk correctly included the assessment in the minute order and abstract, and (2) the assessment under section 70373(a)(1) is mandatory. While he is incorrect on the first point, he is correct on the latter.

Section 70373(a)(1) provides that "an assessment *shall* be imposed on every conviction for a criminal offense, including a traffic offense, . . . The assessment *shall* be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction."[4] (Italics added.) As is the case with mandatory state penalties under Penal Code section 1464, subdivision (a)(1), under which such penalties "shall be levied" (*ibid.*; see *People v. Heisler* (1987) 192 Cal.App.3d 504, 506-507), the assessment provided for in section 70373(a)(1) is likewise mandatory. (See also *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1695 [additional penalties on fines for criminal offenses under § 76000 are mandatory].) Because the trial court had no discretion to refuse to impose the assessment, the failure to order them as part

[4] "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction."
(§ 70373(a)(1).)

of the oral pronouncement constituted an unlawful sentence. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1414.)

The People did not object at the sentencing hearing to the court's omission of the assessment under section 70373(a)(1). Although the People's failure to object to a discretionary sentencing choice will bar its correction on appeal (*People v. Tillman* (2000) 22 Cal.4th 300, 303), an exception to this forfeiture rule exists for "obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings." (*People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*).) Thus, in *Smith*, the high court held that where the trial court omits the imposition of, or imposes the erroneous amount for, a mandatory parole revocation fine under Penal Code section 1202.45, the appellate court may correct the error even if the People failed to object at sentencing. (*Smith*, at p. 852.) Further, in *People v. Talibdeen* (2002) 27 Cal.4th 1151 (*Talibdeen*), the Supreme Court upheld the appellate court's imposition of mandatory penalties under Penal Code section 1464, subdivision (a) and under section 76000, subdivision (a), where the trial court had omitted them and the People did not object. The court concluded that "at the time of sentencing, the trial court had no choice and had to impose state and county penalties in a statutorily determined amount on [the] defendant. The erroneous omission of these penalties therefore 'present[ed] a pure question of law with only *one* answer . . . .' (*Smith, supra*, 24 Cal.4th at p. 853.) Accordingly, we follow our lower courts and hold that the Court of Appeal properly corrected the trial court's omission of state and county penalties even though the People raised the issue for the first time on appeal. [Citations.]" (*Talibdeen*, at p. 1157; see also *People v. Stewart* (2004) 117 Cal.App.4th 907, 910-912.)

The court below was required to impose an assessment under section 70373(a)(1) in the amount of $30 for each of the four felonies of which defendant

was convicted, for a total assessment of $120. Accordingly, we will order the judgment modified to reflect our imposition of this assessment.[5]

III. *Is Imposition of Assessment Here Is Barred by Ex Post Facto Principles?*

Defendant argues that the assessment under section 70373(a)(1) must be stricken for a second reason. He contends that the statute under which the assessment was imposed is penal in nature; because it became effective after the date the underlying offenses were committed, the imposition of the assessment here is in conflict with the constitutional prohibition against ex post facto laws. The Attorney General responds—citing, inter alia, our high court's decision in *People v. Alford* (2007) 42 Cal.4th 749 (*Alford*), and a superior court appellate decision (*People v. Brooks* (2009) 175 Cal.App.4th Supp. 1 (*Brooks*))—that imposition of the assessment challenged here is not precluded by ex post facto principles because the aim of the statute in question, section 70373, is not punitive. The Attorney General is correct.[6]

Both the federal and state Constitutions prohibit ex post facto laws. (U.S. Const., art I, § 10, cl. 1; Cal. Const. art. I, § 9.) California's ex post facto constitutional prohibition is interpreted the same as its federal counterpart.

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[5] Our conclusion here that the assessment is mandatory and our consequent order modifying the judgment presuppose that there is no impediment under ex post facto principles to the imposition of this mandatory assessment by the trial court—or in this instance by this court, where the trial court has failed to do so. As we conclude in part III, *post*, no such impediment in fact exists.

[6] Although we have concluded in part I that imposition of the assessment as reflected in the clerk's minutes and abstract of judgment cannot stand because the court did not impose it during the sentencing hearing, because we conclude that such imposition was mandatory (see pt. II, *ante*), we must determine whether our ordering that the judgment be amended to include the assessment under section 70373(a)(1) would violate ex post facto principles. (See fn. 5, *ante*.)

(*People v. Snook* (1997) 16 Cal.4th 1210, 1220.) The United States Supreme Court defined ex post facto laws in an early decision as "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." (*Beazell v. Ohio* (1925) 269 U.S. 167, 169-170 (*Beazell*).) Many years later, the *Beazell* formulation was more simply stated as follows: "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Collins v. Youngblood* (1990) 497 U.S. 37, 43.) The prohibition against ex post facto legislation "ensures the citizenry has 'fair warning' of the conduct proscribed by law and of the penalties imposed for violating those proscriptions. [Citations.]" (*People v. Frazer* (1999) 21 Cal.4th 737, 754, overruled on other grounds in *Stogner v. California* (2003) 539 U .S. 607.)

In evaluating whether a law retroactively increases punishment under the ex post facto prohibition, our high court has enunciated two inquiries: "[1] whether the Legislature intended the provision to constitute punishment and, [2] if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent." (*People v. Castellanos* (1999) 21 Cal.4th 785, 795, fn. omitted (*Castellanos*).) " 'If the intention of the legislature was to impose punishment, that ends the inquiry. If,

however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " [Citations.] Because we "ordinarily defer to the legislature's stated intent," [citation], " 'only the clearest proof' " will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," [citations].' [Citations.]" (*Alford*, *supra*, 42 Cal.4th at p. 755, quoting *Smith v. Doe* (2003) 538 U.S. 84, 92.)

In *Alford*, *supra*, 42 Cal.4th 749, the high court considered whether the imposition of a court security fee under Penal Code section 1465.8[7] violated the prohibition against ex post facto laws where the statute went into effect after the commission of the crime of which the defendant was convicted. The court decided that the statute was not intended by the Legislature to constitute punishment, because (a) the expressly stated purpose of the statute was nonpunitive, i.e., to procure adequate funding for court security (*Alford*, at p. 756); (b) the law applied not only to those convicted of crimes (*ibid.*); and (c) the amount imposed under the statute was not given nomenclature suggestive of punishment, i.e., the word "fee" was used rather than "fine" (*id.* at pp. 756-757). Considering the second *Castellanos* factor, the court observed that "[o]nly the 'clearest proof' will suffice to override the Legislature's [nonpunitive] intent" to support the conclusion that the statute is so punitive in nature or effect as to

[7] "To ensure and maintain adequate funding for court security, a fee of thirty dollars ($30) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of [Penal Code s]ection 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code." (Pen. Code, § 1465.8, subd. (a)(1).)

constitute punishment. (*Alford*, at p. 757.) In support of its conclusion that the statute did not constitute punishment, the court cited the fact that the fee amount was "relatively small, and less onerous than other consequences that have been held to be nonpunitive" (*id.* at p. 758); the statute did not promote "traditional aims of punishment: retribution or deterrence," but rather promoted court safety (*id.* at p. 759); the amount of the fee was not determined by the seriousness of the offense (*ibid.*); and given the size of the fee, it would have been "inconceivable" that the defendant's prior knowledge that it would be imposed would have deterred him from committing the offense (*ibid.*).

In *Brooks*, *supra*, 175 Cal.App.4th Supp. 1, the appellate division of the Yolo County Superior Court addressed the identical question we must decide here. In *Brooks*, the acts underlying the criminal convictions occurred in May 2008, approximately seven months before section 70373(a)(1) became effective on January 1, 2009. (*Id.* at p. Supp. 3.) The defendant argued that imposing the assessment against him violated ex post facto principles. (*Ibid.*) The court disagreed, applying the analysis the Supreme Court utilized in *Alford*, *supra*, 42 Cal.4th 749, concluding that the assessment under section 70373(a)(1) was not punitive. (*Brooks*, at Supp. 7.) The court observed that the language of section 70373(a)(1) was similar to that of Penal Code section 1465.8 addressed in *Alford*. (*Brooks*, at Supp. 5.) Based upon five factors that had been identified by the Supreme Court in *Alford*, the superior court appellate division concluded that the challenged assessment under section 70373(a)(1) was not a form of punishment and therefore its imposition was not barred by ex post facto principles: "1. The stated purpose of the section 70373(a)(1) assessment is to ensure and maintain adequate funding for court facilities, not to punish. [¶] 2. It is also part of a broad legislative scheme in which civil fees were also raised to fund courthouse construction. [¶] 3. It is termed an 'assessment,' not a fine or a penalty. [¶] 4. The

$30 is larger than the $20 approved in *Alford*, but still relatively small. [¶] 5. The amount of the assessment is not dependent on the seriousness of the offense." (*Brooks*, at Supp. 6.)

We agree with the reasoning of *Brooks*. With respect to the first prong identified in *Castellanos*, *supra*, 21 Cal.4th 795, the Legislature did not intend assessments imposed under section 70373(a)(1) to be a form of punishment. This conclusion is underscored by the stated nonpunitive purpose of the statute ("[t]o ensure and maintain adequate funding for court facilities" (section 70373(a)(1)); the statute being part of a broader legislative scheme in which filing fees in other, noncriminal cases were also raised (see, e.g., § 70611 [fees in unlimited civil filings]; § 70613, subd. (a) [fees in limited civil filings]; § 70621 [fees for superior court appellate division appeals and writ petitions]; § 70654 [fees for guardian petitions]; see also Legis. Counsel's Dig., & Sen. Bill No. 1407 (2007-2008 Reg. Sess.) Stats.2008, ch. 311, pp. 24-26, 28, 32-33); the terminology used by the Legislature ("assessment"); and the assessment applying not only to those convicted of crimes, but also where a traffic infraction of a person who attends traffic school is *dismissed*. (Cf. *Alford*, *supra*, 42 Cal.4th at pp. 756-757.) Considering the second *Castellanos* factor, (1) there are "countervailing considerations [that] undermine a punitive characterization [of section 70373(a)(1)]" *Alford*, at p.758), namely, ensuring and maintaining adequate funding for court facilities; (2) the relatively small amount of the assessment ($30) does not constitute the imposition of a physical restraint; (3) the amount of the assessment is not dependent upon the seriousness of the offense, and in fact, to the extent the assessment is *greater* for an infraction than a felony or misdemeanor, the opposite is true; (4) the amount of the assessment bears a rational connection to the nonpunitive purpose of the statute; and (5) the assessment is not excessive. (Cf. *Alford*, at pp. 757-759.) Therefore, we conclude that there is no proof, let

alone the requisite " 'clearest proof' " (*id.* at pp. 757) that section 70373(a)(1) is "so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent." (*People v. Castellanos*, at p. 795, fn. omitted.)[8]

In reaching this conclusion, we reject defendant's assertion that *People v. High* (2004) 119 Cal.App.4th 1192 (*High*)—a case also relied on by the defendant in *Brooks, supra*, 175 Cal.App.4th Supp. 1—compels a finding that the application of section 70373(a)(1) violates ex post facto principles. In *High*, at issue was the imposition of a state court facilities construction penalty under section 70372. (*High*, at p. 1197.)[9] Unlike the case here, the penalty in *High*—because its calculation was based on all fines, penalties or forfeitures imposed and collected for criminal offenses—"track[ed] the seriousness of the underlying offense and its base penalty." (*Id.* at p. 1198.) Further, the use of the term "penalty" in section 70372—in contrast to the language here—"confirm[ed] a punitive as well as a fundraising purpose behind the statute." (*High*, at p. 1199.) *High* does not suggest

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[8] We also note that the Third District Court of Appeal, in two recent published decisions which are not yet final, has rejected claims that the imposition of an assessment under section 70373(a)(1) for crimes committed before the statute became effective violated the constitutional prohibition against ex post facto laws. (See *People v. Fleury* (2010) 182 Cal.App.4th 1486; *People v. Castillo* (2010) 182 Cal.App.4th 1410.)

[9] "[T]here shall be levied a state court construction penalty, in the amount of five dollars ($5) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including, but not limited to, all offenses involving a violation of a section of the Fish and Game Code, the Health and Safety Code, or the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. This penalty is in addition to any other state or local penalty, including, but not limited to, the penalty provided by Section 1464 of the Penal Code and Section 76000." (§ 70372, subd. (a)(1).)

that the imposition here of an assessment under section 70373(a)(1) is similarly barred by the prohibition against ex post facto laws.

We therefore conclude that our ordering of a modification of the judgment to provide for an assessment of $120 under section 70373(a)(1) will not violate the constitutional prohibition against ex post facto laws.

DISPOSITION

The references to "ICMF $120" in the February 6, 2009 clerk's minutes and abstract of judgment, being inconsistent with the court's oral pronouncement of sentence, are ordered stricken. Upon the striking of these references, we order that the judgment be modified to reflect this court's imposition of assessments in the total amount of $120 pursuant to section 70373(a)(1). The clerk is directed to prepare an abstract of judgment consistent with the court's oral pronouncement of sentence with the addition of this court's assessment of $120 imposed pursuant to section 70373(a)(1). As modified, the judgment is affirmed.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.